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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JACK W. HUSSEY,
Respondent.

No. 342.

PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF.

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Respondent, in his supplemental brief, challenges the power of the District Court to have determined, and presumably of this Court to now determine, that the evidence failed to show negligence on the part of the defendant. He says, in effect, that in a res ipsa loquitur case the trial court cannot direct a verdict, and that in all such cases the issue must be submitted to a jury. In support of this

view the case of Gleason v. U. S., 140 U. S. 143, has been put forward.

That respondent misinterprets the effect of the decision in that case is, we think, clearly demonstrated in the case of Holland v. Director General, 273 Fed. 928, decided by the Circuit Court of Appeals for the Third Circuit. This, too, was a passenger case. The train upon which the plaintiff was riding was derailed, the derailment being caused by a break in the rail, due to a latent defect. The rail had been inspected shortly before the accident. The Court of Appeals truly stated the applicable law, we submit, in the following language:

> "If, on the other hand, the defendant had used that high degree of care for the safety of the plaintiff, Hazel Holland, which it owed her under the law, and the evidence showing such care was undisputed, or if disputed or conflicting, was nevertheless of so conclusive a character that the Court, in the exercise of a sound judicial discretion, would set aside a verdict in opposition to it, it was the duty of the trial judge to direct a verdict, for he stands primarily charged with the full responsibility for the just outcome of the trial (citing cases). In an accident such as this, which raises a presumption of negligence, the case must go to the jury unless the evidence introduced by the defendant conclusively exculpates it from negligence."

The language quoted reflects the rule of law announced by this Court in the case of Slocum v. Insurance Co., 228 U. S. 364, where this Court said:

> "As a preliminary to the consideration of the first question it may be well to repeat what this Court often has said, that when, on the trial of the issues of fact in an action at law before a federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the Court may and should direct a verdict for the other party."

In Dierkes Lbr. Co. v. Brown, 19 Fed. (2d) 732, which was a res ipsa loquitur case, the Circuit Court of Appeals for the Eighth Circuit said:

> "The presumption arising from the circumstances may be sufficient to take the case to the jury unless the entire evidence is such that the presumption cannot stand against it."

In the case of Penn. R. R. v. Buckley, 210 Fed. 268, the plaintiff, a passenger, sued for injuries received in the derailment of the train. The cause of the derailment is thus stated by the Court:

> "Immediate inspection of the switch disclosed a broken lug or crank—an inconspicuous but important part of the mechanism—and disclosed, further, that a

small latent defect existed, such as might occur in the process of casting. This defect was not visible on the surface of the lug, but showed itself on the edges of the broken metal. The morning was very cold and the low temperature may have had something to do with the break. There can be little doubt concerning what took place. The vibration of the heavy engine, the latent defect, and, perhaps, also, the influence of the cold, combined to break the lug and then to jar the points of the switch out of place, thus deflecting the last three cars into the siding."

Upon this state of facts the Court said:

"There being no doubt that the plaintiff was injured while a passenger, and that his injury was due to a defective appliance of transportation, a presumption of the carrier's negligence arose immediately and required explanation. The explanation was offered and, in several respects, was certainly sufficient. It showed that the switch was new, was an approved device, and had come from a skilled maker. It also showed very recent inspection, and, if this inspection were adequate, if it measured up to the standard of care imposed upon the carrier, nothing more could be demanded. The defendant could not be held liable simply because an accident had been caused by a latent defect if it had performed every duty imposed by law."

See, also, Gray v. B. & O. R. R., 24 Fed. (2d) 671, a passenger case, in which the Circuit Court of Appeals for

the Seventh Circuit found that the evidence of the defendant was sufficient to exculpate it from blame.

See, also, Warner v. B. & O., 168 U. S. 339, which was a passenger case, in deciding which this Court said:

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."

This having been said with respect to a res ipsa loquitur case, a case in which a passenger had been injured, leads to the fair inference that where in such a case reasonable men may not fairly differ upon the question of negligence, a verdict may and should be directed by the trial judge.

In Elliott v. R. R., 150 U. S. 245, this Court said:

> "It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a jury, yet, when the undisputed evidence is so conclusive that the Court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

There is no reason why a res ipsa loquitur case should be exempted from the rules thus laid down by this Court. The happening of the accident in a res ipsa loquitur case is evidence of negligence. It is not conclusive evidence of

negligence. It may be little or great, depending upon the particular circumstances. It requires the defendant to exculpate himself. But when a defendant establishes a state of facts which, in the minds of reasonable men, destroys the inference of negligence, surely it is the Court's privilege and duty to direct a verdict for him. The scintilla rule does not obtain in the federal courts. (See Gunning v. Cooley, 281 U. S. 90.)

The defendant in the instant case moved for a directed verdict at the close of all the evidence in the case. The question of the propriety of denying this motion is one properly to be considered by this Court. (See Slocum v. Insurance Co., 228 U. S. 364.)

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